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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-54

CITY OF LOS ANGELES, CALIFORNIA, et al.,
Petitioners,

v.

FANCHON BLAKE, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY OF HOUSTON, TEXAS, AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE CITY OF HOUSTON, TEXAS, AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTRODUCTION

The City of Houston, Texas, files this brief as *Amicus Curiae*, pursuant to the fourth paragraph of Rule 42 of the Rules of the Supreme Court of the United States, to urge that this Court grant the Petition by

the City of Los Angeles, California, for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's decision in the case styled *Blake v. City of Los Angeles.*

STATEMENT OF INTEREST

Like the Petitioner City of Los Angeles, the City of Houston is an employer as defined by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e(b), and is subject to the restrictions which that statute places on its employment practices. As a municipality, the City of Houston has a compelling governmental interest in providing police services to its community and seeks to promote the safety of persons and property by maintaining an efficient and effective police force. After a team of industrial psychologists conducted a validation study of its entrance standards, the Houston Police Department temporarily suspended its minimum height requirement for applicants, pending further study of its job-relatedness. Before the City of Houston could lawfully act on the results of such study, it believes that this Court should clarify the standard of proof necessary for a public employer to show the job-relatedness and business necessity of a particular employment practice and should determine whether such practice may be "validated" only in the specific ways prescribed by regulations of the Equal Employment Opportunity Commission (EEOC). Based on the reasoning of the Ninth Circuit in *Blake v. City of Los Angeles,* the City of Houston would be virtually unable to show the business necessity of any employment requirement which had a statistical adverse impact on any protected group under Title VII. Thus, the effective result must be that an employer can

seldom, if ever, implement any employment standard in face of a statistical adverse impact, however rationally related it may be to a particular job.

HISTORY OF THE CASE BELOW

This case arose as a sex discrimination suit challenging certain employment policies of the Los Angeles Police Department. The district court granted defendants' motion for summary judgment, holding that the City's separate classifications of "Policeman" and "Policewoman" prior to March 24, 1972, (the date Title VII was extended to cover municipal employers) did not violate the equal protection clause of the Fourteenth Amendment; that the temporary continuation of the dual classification for the period from March 24, 1972 to June, 1973, did not violate Title VII because this transition period was reasonably justifiable as a business necessity; and that the newly adopted requirements existing after June, 1973, were lawful under Title VII because of their clear job-relatedness. *Blake v. City of Los Angeles,* 435 F.Supp. 55 (C.D. Cal. 1977). On appeal to the United States Court of Appeals for the Ninth Circuit, that court reversed the district court's holdings on these three points. ____F.2d____ (Slip opinion, May 2, 1979).

This Amicus believes that the reversal on all three points was erroneous. However, because of the overwhelming importance of the Appeals Court's holding on the standard of proof for "job-relatedness" and "business necessity" under Title VII as a continuing concern to employers, this Amicus brief will be limited to that issue alone, in the interest of brevity.

REASON FOR GRANTING THE WRIT

This Court should clarify the meaning of "job-relatedness" and "business necessity" as legal standards under Title VII.

In the proceedings before the district court, the defendants offered substantial evidence in the form of a professional validation study in support of the challenged entrance requirements, adopted in June, 1973, for the Los Angeles Police Department. These included a minimum height requirement of 5′ 6″ and a physical abilities examination designed to test physical endurance, strength, and agility. The two requirements, as the district court recognized, "imposed a severe adverse impact upon women." *Blake v. City of Los Angeles,* 435 F.Supp. 55, 62 (C.D. Cal. 1977). Nevertheless, that court concluded that the requirements met the legal standards of Title VII because of defendants' proof of job-relatedness. Plaintiffs' objections that this proof did not comport with the validation procedures in the EEOC regulations did not sway the court. Instead, it offered this response based on common sense:

> "There is no magic in any validating procedure, and the defendants need only supply competent and relevant evidence on this issue. As the Supreme Court said in *Washington v. Davis:*
>
> > 'It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance.' 426 U.S. at 247, n.13, 96 S.Ct. at 2051.
>
> The more obscure the justifications are, the more searching the inquiry must be. Conversely, the more obvious the relationship between the classification and the job requirements, the less searching the inquiry becomes." *Id.* at 65.

This Amicus would respectfully suggest that the district court exhibited a better grasp of what this Court has previously articulated on the concepts of job-relatedness and business necessity than did the Ninth Circuit. The latter court preferred a stringent approach, saying "Because the 'business necessity' defense is very narrow, it is not easy for employers to demonstrate the job-relatedness of selection devices shown to be prima facie violations of Title VII." (Slip op. at 15-16.) Nothing which this Court has said supports the view that an employer must adjust all selection standards to remove any statistical adverse impact on any protected group, save for the most narrow exceptions justified by elaborate and complex validation studies. Rather, in enacting Title VII, Congress merely required "the removal of *artificial, arbitrary,* and *unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971) (Emphasis added). Unlike this Court's approach in *Griggs,* the inexorable result of the approach decreed by the Ninth Circuit must be the abandonment of employment selection criteria, however firmly supported by common sense, if a statistical adverse impact is perceived. Such a result is contrary to this Court's express construction of congressional intent:

> "Congress has not recommended that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such

qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Griggs v. Duke Power Co., supra,* at 436.

In *Griggs,* the requirements in issue did not "bear a demonstrable relationship to successful performance of the jobs" and were adopted "without meaningful study of their relationship to job-performance ability." *Id.* at 431. The same consequences were apparent in *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) where the testing was implemented without analysis of the particular skills of the jobs involved or any significant correlations between test results and job performance.

However, in *Blake v. City of Los Angeles,* the Ninth Circuit imposed a higher standard of proof:

> "To justify the use of pre-employment selection devices as a business necessity, an employer must show that the tests or requirements are so closely job-related that their use is 'necessary to safe and efficient job performance.' (*Dothard, supra,* 433 U.S. at 332 n.14) Thus, the burden of demonstrating the job-relatedness of selection devices cannot be easily satisfied. (*See Officers for Justice, supra,* 395 F.Supp. at 384 (the large exclusionary impact of certain selection devices requires 'a very high degree of persuasion' for defendants to justify their use).) It is not a burden that can be carried by the assertion of an 'obvious,' but unmeasured, relationship between selection standards and qualities thought necessary for job performance. (*Dothard, supra,* 433 U.S. at 331.) Rather, it is essential that selection devices be 'validated' by professionally-acceptable methods. (*Albemarle, supra,* 422 U.S. at 431; *see Washington v. Davis, supra,* 426 U.S. at 247 & n.13.)" *Blake v. City of Los Angeles,* ____ F.2d____ (Slip op. at 17-18).

The court went on to mandate either a professional validation study or an even heavier burden of proof:

> "Validation studies must employ professionally-acceptable methods to increase the liklihood of obtaining trustworthy results. Courts have recognized that a number of validation techniques are professionally acceptable. (*See Washington v. Davis, supra,* 426 U.S. at 247 n.13 (describing three professional methods of validation).) The Equal Employment Opportunity Commission ('EEOC') has incorporated these techniques into guidelines that outline minimum standards for professional validation studies. (29 C.F.R. Sec. 1607) The Supreme Court has held that the EEOC guidelines are 'entitled to great deference' from courts determining whether employment selection devices comply with Title VII. (*Griggs, supra,* 401 U.S. at 434. *See Washington v. Davis, supra,* 426 U.S. at 247 n.13; *Albemarle, supra,* 422 U.S. at 430-34). Although compliance with the EEOC guidelines is not mandatory, an employer's burden of justification is much heavier if the guidelines have not been followed. (*United States v. City of Chicago, supra,* 573 F.2d at 427.)" *Id.* (Slip op. at 18-19).

The policy consideration behind such a demanding approach was made clear in footnote 6, where the Ninth Circuit said, in part, "The fact that it may be difficult to professionally validate selection devices does not excuse non-compliance with professional procedures; rather, it suggests that employers should be more cautious in employing selection devices that have discriminatory impacts." Thus, the employer can lawfully adopt only those selection standards, however obvious or appropriate, which either have no adverse impact or which are subject to a formal validation study.

Given the growing sophistication of the field of industrial psychology, it is a proper requirement that various testing procedures be studied on an experimental basis before allowing them to become "built-in headwinds" perpetuating prior inequities, without measuring job capability. *Griggs v. Duke Power Co., supra,* at 432. This Amicus firmly endorses the goal of equal opportunity for all and the abandonment of artificial barriers so well articulated in *Griggs.* But the limitations of validation procedures must not also limit the use of logic and reason in approaching that touchstone of business necessity. Yet this is the inevitable upshot of the Ninth Circuit's approach.

The ideal proof that a particular employment qualification is clearly "necessary to safe and efficient job performance," *Dothard v. Rawlinson,* 433 U.S. 321, 332, n. 14 (1977), is to employ persons with and without that particular qualification and compare their respective job performances. If the persons without that particular qualification are as effective as those with it, the conclusion is inescapable that the qualification does not "bear a demonstrable relationship to successful performance of the job for which it was used." *Griggs v. Duke Power, supra,* at 431. Conversely, if those lacking the particular qualification are consistent failures in their job performance, and if those with the particular qualification are successful, all other factors being the same, the job-relatedness is unquestionably established.[1] Such an

1. Unfortunately, the real world seldom provides such clearcut answers even where closely controlled experimentation is possible. Neither group is likely to perform uniformly well or poorly, but only more consistently in one direction than the other. Hence, the attempt of industrial psychologists to quantify the relationship between the particular qualification and the job performance in terms of correlation coefficients or other statistical expressions.

experimental approach is easily applied to some jobs and some projected qualifications. For others, only careful job analysis is possible, with the qualifications being linked through logic, rather than actual experimentation, to establish a rational relationship.

A modest example shows how methodology merges with madness if carried to the extreme. Suppose that, because of inferior educational opportunities or cultural barriers, a minority group has a very high percentage of non-swimmers compared to the majority. Thus, the ability to swim as a requirement for the job of lifeguard would have an adverse impact against this minority group, requiring proof of business necessity, And, said the Ninth Circuit, it "is not a burden that can be carried by the assertion of an 'obvious', but unmeasured, relationship between selection standards and qualities thought necessary for job performance." (*Blake,* Slip op. at 18.) To be sure, a comprehensive job analysis could show that swimming is occasionally done by lifeguards to effect a rescue. But how frequently must it occur? The Ninth Circuit implied the control of resisting suspects occupied only a minor part of police duties (see footnote 8), since an officer wrestled with a suspect only once every 20 watches and was kicked or hit once every 33 watches. How frequently must a skill be used before it will support a job requirement? That court also suggested the exclusion from the validation study of persons who did not meet the minimum height requirement was a telling criticism. Must non-swimmers be employed as lifeguards to establish by statistics (of the number of victims) that they could not perform equally as well? And, would a few successful rescues by non-swimmers in shallow water be sufficient to reduce the correlation

to make it of little value? Would unsuccessful rescue attempts by the swimmers be deducted from the number of successful rescues, thereby further reducing the correlation with job performance? Given the Ninth Circuit's standard of review for validation studies, one might be left without adequate proof that the ability to swim is so manifestly related to the job of lifeguard as to be justified by business necessity.

If the foregoing example is a form of *reductio ad absurdum,* it has its real-life counterpart in *Smith v. Olin Chemical Corp.,* 555 F.2d 1283 (5th Cir. 1977). There a laborer was discharged because he had a bad back, even though the employer had not conducted a validation study to support this requisite. The original panel that considered the case quoted plaintiff's theory:

> "Because sickle cell anemia affects Blacks almost exclusively, probability dictates that bone degeneration, a common condition resulting therefrom, would be present among proportionately more Black workers in a labor force than among workers of any other race. If the presence of bone degeneration is used to automatically disqualify a worker from a position which involves manual labor, proportionately more Black workers would be disqualified than workers of any other race. This is unquestionably a discriminatory effect within the meaning of *Griggs v. Duke Power* . . . Therefore the defendant has the very heavy burden of showing that business necessity requires continuation of the discriminatory practice." *Smith v. Olin Chemical Corp.,* 535 F.2d 862, 864 (5th Cir. 1976)

This language is analogous to that of the Ninth Circuit in *Blake,* quoted *supra.* However, after an *en banc* rehearing, the Fifth Circuit firmly rejected plaintiff's theory:

> "The question then is whether, assuming that the pre-conditioning of employment for manual labor on the absence of bad back or degenerative spinal conditions operates to discriminate against black Americans in substantially disproportionate percentages, an employer should be forced to satisfy an evidentiary burden of proving business necessity under *Griggs.* We think not." *Smith v. Olin Chemical Corp., supra,* 555 F.2d at 1286.

Unlike the Ninth Circuit's conclusion that Title VII mandated universal validation studies, the reasoning of the Fifth Circuit was very similar to that of the district court in *Blake*:

> "Few cases have dealt with the proposition that there are certain employment practices that will not trigger the requirement of proof from the employer. Indeed, some may assert that every practice which has a discriminatory effect requires some evidentiary proof from the employer to justify its use. We are not so ready, however, to permit bare 'effects' allegations to carry the burden to the employer where the employment requirement is patently neither artificial nor arbitrary, and obviously related to business necessity." 555 F.2d at 1286. (Compare *Blake v. City of Los Angeles,* 435 F.Supp. at 65.)

The Fifth Circuit then analyzed this Court's opinion in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and found it "clearly indicates that there is a narrow class of job requirements for which no evidentiary showing is needed." *Smith v. Olin Chemical Corp.,* 555 F.2d at 1286. In *Green* the employer had offered no proof that the articulated "legitimate, nondiscriminatory reason for the employee's rejection" had "any effect on the plaintiff's ability to perform the work." Thus, "as a matter

of law, the Supreme Court held that the practice did not require evidentiary justification, and said that the only issue on remand would be whether the policy was used as a pretext." *Smith v. Olin Chemical Corp., supra* at 1286-1287. That court went on to suggest that

> "the direct comparison with *Griggs* in the text and the company-wide nature of the policy indicate the holding has significance beyond its particular facts. It suggests that a facially neutral job criterion can be so manifestly job-related so as not to be 'the kind of "artificial, arbitrary, and unnecessary barriers" ' Title VII prohibits. In such a case, the employer need not make an evidentiary showing of business necessity, even though the criterion may have a discriminatory impact.
>
> "The need for a manual laborer to have a good back is such a criterion." 555 F.2d at 1287.

A similar approach based on common sense and flexibility in evaluating employment requirements is found in *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) where that Court declared:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Id.*, 475 F.2d at 219.[2]

That the Fifth Circuit's analysis of *McDonald Douglas v. Green, supra,* in *Smith v. Olin Chemical Corp., supra,* was correct is suggested by this Court's decision in *Furnco Construction Co. v. Waters,* ____U.S.____, 98 S.Ct. 2943 (1978). There the employer's reliance in hiring only experienced and highly qualified fire bricklayers was justified as a business necessity required for the safe and efficient operation of its business and not as a pretext for racial exclusion. There is no suggestion that the employer either had to validate its requirement by the EEOC guidelines on testing or face a heavier burden of justifying it. Indeed, this Court's opinion strikes a contrast to the Ninth Circuit's admonition "that employers should be more cautious in employing selection devices that have discriminatory impacts" (*Blake v. City of Los Angeles,* footnote 6). In *Furnco Construction Corp. v. Waters, supra,* 98 S.Ct. at 2949, this Court observed:

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2. See also *Boyd v. Ozark Air Lines,* 568 F.2d 50, 54 (8th Cir. 1977), which specifically rejected the Plaintiff's argument that a minimum height requirement must be validated in accord with the EEOC guidelines. Similarly, in *Yuhas v. Libbey-Owens-Ford Co.,* 562 F.2d 496 (7th Cir. 1977), statistical proof was lacking, and that Court upheld the challenged policy and made this balanced assessment:

> "It would be hard to prove that any of these reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous. They correspond to the reasons which have led a number of institutions to conclude that family members should not work in the same environment. The movement to a sharp dichotomy between the workplace and the home may not in the long run prove to be a fruitful one, but it has become widely prevalent in our society." 562 F.2d at 499.

> "The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII."

It would seem that this is the basic thrust of the Ninth Circuit's *Blake* opinion, i.e. to remove all employment requirements which might affect minority groups on a statistical basis by imposing unrealistic demands on the employer to justify them. The *Blake* court would further limit an employer's flexibility in examining available alternatives even if a business necessity can be shown (Slip op. at 24-25). The Los Angeles Police Department, the Ninth Circuit suggested, must modify departmental policies if necessary to employ an equal percentage of male and female applicants. This approach seems to go further than that already rejected in *Furnco Construction Co. v. Waters, supra,* 98 S.Ct. at 2949, where the employer was merely to "consider" the largest number of minority applicants.

Surely the departmental policies of the Los Angeles Police Department are entitled to equal, if not greater, deference than the legitimate purpose recognized in *Furnco.* This Court has frequently noted the unique and sensitive nature of the police function in our society. See *National League of Cities v. Usery,* 426 U.S. 833, 845-852 (1976); *Kelley v. Johnson,* 425 U.S. 238 (1976); *Foley v. Connelie,* ____U.S.____, 98 S.Ct. 1067 (1978). In the latter case, this Court observed:

> "A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex modern society where police presence is pervasive. The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se,* but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life." *Foley v. Connelie, supra,* 98 S.Ct. at 1071.

The distinctive nature of the police officer's job also made it fundamentally different from other types of employment:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community' that the then Mr. Justice Hughes referred to in *Truax v. Raich,* 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who exercises no broad power over people generally. Indeed, the rationale for the qualified immunity historically granted to the police rests on the difficult and delicate judgments these officers must often make. See *Pierson v. Ray,* 386 U.S. 547, 555-557, 87 S.Ct. 1213, 1218-1219, 18 L.Ed.2d 288; cf. *Scheuer v. Rhodes,* 416 U.S. 232, 245-246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974)." *Id.* 98 S.Ct. at 1072.

Nothing in the Ninth Circuit's *Blake* opinion suggests that Court saw any distinction between the function of a police officer and that of any other job. As a result, whatever the job, there must be selection standards designed to maximize the employment of minorities and women, even though reasonable policies and procedures must be modified or abandoned to achieve that end.[3] Neither the terms of Title VII nor this Court's construction of it supports the reasoning or the result of the Ninth Circuit's *Blake* opinion. This Court should clarify the meaning of "job-relatedness" and "business necessity" as legal standards under Title VII.

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3. The view that the business necessity defense "is very narrow," (Slip op. at 15) makes it analogous to the "strict scrutiny" standard of review in Equal Protection cases. That approach was expressly rejected in *United States v. State of South Carolina,* 445 F.Supp. 1094 (D. S.C. 1977), where a three-judge court said:

> "We think that *Griggs* did not import into Title VII law the concept of 'compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance the disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact. It is our view that the Supreme Court intended an examination of the alternatives available with respect to the legitimate employment objective identified by the employer to determine whether there is available to the employer an alternative practice that would achieve his business purpose equally well but with a lesser disparate impact by race. In examining alternatives, the risk and cost to the employer are relevant." 445 F.Supp. at 1115.

This Court affirmed that judgment, ____U.S.____, 98 S.Ct. 756 (1978).

CONCLUSION

For the foregoing reasons, this Amicus urges that the petition for Writ of Certiorari be granted.

Respectfully submitted,

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